FEBRUARY 20, 2014

March10, 2014

By Electronic mail (seec.compliance@ct.gov)

State Elections Enforcement Commission
Attn: Marianne Sadowski
20 Trinity Street
Hartford, CT 06106

Re: Comments on Proposed Declaratory Ruling 2014-01: Construction of the Phrase "Make or Obligate to Make" as Applied to Disclosure of Independent Expenditures

Dear Commissioners:

These comments are filed on behalf of Common Cause Connecticut with regard to Proposed Declaratory Ruling (PDR) 2014-01: Construction of the Phrase "Make or Obligate to Make" as Applied to Disclosure of Independent Expenditures. Common Cause Connecticut urges the Commission to approve and issue the Declaratory Ruling as set forth in PDR 2014-01.

PDR 2014-01 responds to a petition for a declaratory ruling submitted on October 9, 2013 by the law firm of Perkins Coie on behalf of some of its clients, seeking guidance on the application of Connecticut campaign finance disclosure laws to certain organizations which may make independent expenditures to influence Connecticut elections. The petition was clarified in a supplemental filing by Perkins Coie on November 1, 2013, in response to questions from the Commission.

In particular, the PDR addresses the application of a provision of General Statute § 9-601d(a), which was added by Public Act No. 13-180, and that requires that any person who "makes or obligates to make" an independent expenditure in excess of $1,000 to file disclosure reports with the Commission. Section 9-601d(b) requires any person who "makes or obligates to make" an independent expenditure in excess of $1,000 for candidates for legislative or statewide office to file a disclosure report not later than 24 hours after making such payment or "obligating to make any such payment."

The petitioner seeks construction of the term "obligates to make" an independent expenditure, as used in these statutory provisions, in order to clarify when reporting requirements are triggered. In particular, the petitioner poses two hypothetical situations and asks for a ruling on how the disclosure requirements of section 9-601d would apply in each.

In the first, an organization contracts with a media consultant to produce advertisements, subsequently directs the consultant to purchase stock footage for the ads, subsequently reserves

airtime for an ad, subsequently creates an ad that qualifies as an independent expenditure, subsequently ships the ad to the TV station, subsequently has the ad inserted into the station's line-up and the ad is subsequently aired.

In the second situation, the organization creates a newspaper ad, subsequently reserves space in a newspaper for the ad, and the ad subsequently appears in the newspaper.

For each situation, the petitioner asks when the organization has triggered the "obligates to make" disclosure requirement.

Common Cause Connecticut strongly supports the analysis set forth in the PDR in response to the petitioner's questions. The PDR states that, as a general matter, the disclosure requirement is triggered when the organization "has decided to secure goods or services to develop or publish an independent expenditure advertisement and promises or agrees to make a payment for such goods or services, in a contract or otherwise." PDR at 4. The PDR correctly rejects the petitioner's proposal that the disclosure requirement is triggered only when the organization "has reached some point in time after which it can no longer change its mind about the nature of the expenditure." *Id.*

Thus, in the first situation, the PDR correctly concludes that the disclosure requirement is triggered for the organization "as soon as it obligates to make an expenditure in excess of one thousand dollars related to that advertisement . . . ." PDR at 6. Exactly when that point is reached depends on the particular facts. It could be, for instance, when the media consultant is hired, if the consultant's contract is only for a media campaign to make independent expenditures. *Id.* Or it could be when the organization directs its consultant to purchase the stock footage, assuming that it is footage of a clearly identifiable candidate for use in an independent expenditure. *Id.* at 7. Even if the footage is not of an identifiable candidate, the organization would be obligating to make an independent expenditure if its board of directors has voted to pay for a media campaign in opposition to a candidate. *Id.* Or it could be when the organization has reserved air time, and directed its staff to produce an independent expenditure for that air time. *Id.* at 8.

In the second situation, the PDR correctly concludes that the disclosure requirement is triggered when the organization reserved the advertising space in the newspaper, because that is when "the organization takes some action to obligate the payment of funds to produce or publish" an advertisement that qualifies as an independent expenditure. *Id.*

The conclusions reached in the PDR best implement the policy behind the statutory disclosure provisions, and best serve the goal of providing timely and meaningful disclosure. If the Legislature had intended that disclosure would be triggered only by the actual dissemination of an independent expenditure, it would not have included the additional "obligates to make" language in the law. *See* PDR at 3 ("Thus, we are required to construe the phrase 'obligates to make' to have a meaning different and apart from the term 'make.'"). That additional language is clearly intended to broaden the disclosure requirement to ensure that the public has time to evaluate the disclosure information. The PDR recognizes and implements this goal.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the U.S. Supreme Court addressed a similar disclosure provision in the Bipartisan Campaign Reform Act of 2002 (BCRA). That law includes a disclosure provision for "electioneering communications" made under federal law, triggered by the date a person "has made disbursements" for an electioneering communication in excess of $10,000. 2 U.S.C. §434(f)(4)(A). The statute also provides that "a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." *Id.* at (f)(5).

Plaintiffs in *McConnell* challenged the executory contract provision as unconstitutional. The Supreme Court rejected the challenge, stating that "the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant." *McConnell,* 540 U.S. at 200. The Court noted that without such a provision, spenders could manipulate their expenditures to frustrate meaningful disclosure:

> Yet fixing the deadline for filing disclosure statements based on the date when aggregate disbursements exceed $10,000 would open a significant loophole if advertisers were not required to disclose executory contracts. In the absence of that requirement, political supporters could avoid preelection disclosures concerning ads slated to run during the final week of a campaign simply by making a preelection downpayment of less than $10,000, with the balance payable after the election.

Id. at 201. The PDR echoes this concern about evasion, in noting that the alternative interpretation suggested by petitioners "would lead to the absurd result that the person making an independent expenditure could simply structure its relationship to avoid meaningful disclosure when it is engaging in activities it would otherwise be mandated to disclose." PDR at 4.

So too, the Supreme Court rejected the argument that disclosure triggered by executing a contract for a disbursement could result in disclosure of disbursements that may never in fact be made, thereby leading to confusion. The Court in *McConnell* said that "such speculation cannot outweigh the public interest in ensuring full disclosure before an election actually takes place." *Id.* (emphasis added).

Although the specific statutory mechanism for timely disclosure is different in BCRA than in Connecticut law—requiring disclosure triggered by an executed contract instead of by an "obligation" to make an independent expenditure—the purpose of the broadened disclosure requirement is the same: "informing the public about various candidates' supporters *before* election day." *McConnell,* 540 U.S. at 201 (internal citation omitted; emphasis in original). The U.S. Supreme Court's emphatic endorsement of such disclosure under BCRA applies as well to the similar provision in Connecticut law, and to the Commission's implementation of it in the PDR.

Finally, and as the PDR correctly notes, PDR at 5, the Supreme Court and the lower federal courts have consistently upheld broad disclosure provisions as both permissible under the First Amendment and as necessary to serve the public interest in an informed electorate. Even in *Citizens United v. FEC,* 130 S. Ct. 876 (2010), where a 5-4 Court majority deemed

unconstitutional the longstanding ban on corporate expenditures in federal elections, an 8-1 majority of the Court resoundingly upheld provisions requiring disclosure of federal electioneering communications. Disclosure requirements, the Court said, "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." 130 S. Ct. at 914 (internal citations omitted). Instead, disclosure requirements "help citizens make informed choices in the political marketplace." *Id.* (internal citations omitted).

It is the goal of helping the citizens of Connecticut "make informed decisions in the political marketplace" that supports the interpretation of state disclosure laws set forth in the PDR. The PDR interprets and applies the "obligates to make" standard of section 9-601d in a manner that is most consistent with the statutory language, and with the purpose of the disclosure law to provide meaningful and timely information to voters about the identity of those who are spending money to influence their votes.

For the foregoing reasons, we urge the Commission to adopt the declaratory ruling set forth in PDR 2014-01. We appreciate the opportunity to submit these comments.

Sincerely,

Cheri Quickmire
Executive Director